No. 10-19-00196-CR

IN THE COURT OF APPEALS

FOR THE STATE OF TEXAS

TENTH JUDICIAL DISTRICT

IJAH IWASEY BALTIMORE,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal from the 54th District Court
Of McLennan County, Texas
Trial Court No. 2017-449-C2

BRIEF FOR APPELLANT
ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Ijah Iwasey Baltimore pleaded not guilty to the indicted offense of unlawful carrying of a weapon on a premises licensed to sell alcohol by the State of Texas (5 RR 162), (CR 5). Although the indictment does not allege on which licensed premises Ijah is accused of unlawfully carrying a weapon, this defect in the indictment was not raised pretrial nor at trial (1 RR 3-9, CR 5).

Pretrial, Ijah had entered a plea of guilty to the indictment in exchange for the State's recommendation of three years of deferred probation (2 RR 14, CR 16-24). At sentencing, Ijah withdrew his plea after he learned the trial court, the Honorable Matt Johnson presiding, intended to prohibit him from carrying a weapon while on supervision (3 RR 5-6).

At the guilt/innocence phase, Ijah made no substantive objections that were overruled by the trial court. The jury found Ijah guilty of the charged offense (6 RR 156). Ijah, who was probation eligible and timely filed a "motion for community supervision", elected to have the jury assess punishment (*id.* at 6, CR 27, 28). The jury sentenced Ijah to 4 years and no fine, and recommended that the trial court suspend imposition of that

sentence and put Ijah on community supervision. (CR 71), (6 RR 30). The trial court sentenced Ijah in accordance with the jury's verdict, ordered that Ijah be placed on community supervision for a period of 4 years, and certified his right to appeal (CR 136).

Ijah timely filed his notice of appeal (*id.* at 83).

REQUEST FOR ORAL ARGUMENT

Oral Argument before this Court is requested.

ISSUE PRESENTED

I. Whether the evidence is legally insufficient to support the conviction.

STATEMENT OF FACTS

On November 25, 2016, the night of Thanksgiving, Ijah, a United States Air Force veteran, had gotten off work at Wal-Mart distribution center and briefly went to the bar, Crying Shame (6 RR 103-104, 7 RR 9). Although the only testimony that the Crying Shame was an establishment that was licensed to sell alcohol was through the State's law enforcement witnesses, there was no dispute that the Crying Shame was a McLennan County establishment that is licensed to sell alcohol (*id.* at 44, 69).[1] However, there was no testimony regarding the boundaries of the licensed premises including whether the parking lot was directly or indirectly under the control of the Crying Shame.

Similarly, there was no dispute that Ijah did not carry a firearm inside Crying Shame (*id.*at 30, 46, 64). The events testified to by both Ijah and State's witnesses, James "Ty" Johnson and Davina Cook[2,] and Waco Police

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[1] Although the indictment does not allege on which licensed premises Ijah is accused of unlawfully carrying a weapon, any potential defect in the indictment was not raised pretrial nor at trial (1 RR 3-9, CR 5).

[2] Formerly Davina Clater at time of incident (6 RR 9).

Department Officers Billy Gann and Brandon Garrett, all occurred in a parking lot (*id.* at 8, 13, 30, 21, 43, 52, 106).

Having stayed at Crying Shame less than a half hour, Ijah left to the parking lot to get on his motorcycle, and go home (*id.* at 43-44). Ty, Davina, and Davin's cousin, Leonard "Will" Hill, left the bar after Ijah (*id.* at 13). As Davina, Will, and Ty were leaving Crying Shame, Ty saw Ijah "sitting at the front of the parking lot on his motorcycle," (*id.* at 49). According to Davina, Ty pulled his car over near Ijah "as [Ty's] leaving the parking lot" (*id.* at 14, 18). Ijah then gets off his motorcycle and approaches Ty's vehicle (*id.*). Ijah has his foot in the way of Ty's vehicle and when Ty moves his car to avoid Ijah's foot, Davina testified Ijah "reaches in his pocket . . . pulls it out and he sticks it right between . . . in Ty's face, and said – his exact words were, [b]itch, I'm tired of you playing with me.'" (*Id.* at 20.) Davina then told Ijah, "'[b]itch, you better not shoot him,'" (*id.* at 22). Will then "went into defense mode," "grabbed [Ijah's] arm and stuck his arm down," and told Ijah, "let the gun go or I'm going to blow your knee cap off (*id.*). Davina stated that Ijah did not let the gun go and Will pistol-whipped Ijah

with the gun (*id.*). Will threw the gun on the top of the roof and told Ijah, "[i]f you want your gun, there it is." (*Id.*). For purposes of Ijah's alleged error here, Ty's testimony was not materially different.

During his testimony before the jury, as well as his pretrial statements to the trial court, Ijah consistently maintained that he was not the initial aggressor (*id.* at 119, 3 RR 9). Ijah explained that he had just finished putting on his motorcycle gear, about to leave the parking lot and that his gun was in his saddle bag, rolled up in his jacket (*id.* at 119-20). He was heading immediately home (*id.* at 117), and that his gun was out of his saddlebag, under his jacket, and in his pants (*id.* at 121). Ijah testified that at the time was approached by a male he did not know the gun "was actually falling down my pants," and that his hand was grabbed by the unknown male while he was adjusting the gun, to prevent it from falling (*id.*). The gun was taken from him and it was put in his face (*id.* at 122), and then the unknown male "tried to take the firearm and leave," (*id.* at 123). Ijah told the unknown male he was not going to let him leave with the firearm because it was registered to him, and the unknown male cocks it back,

throws it on the roof and runs off (*id.*). Ijah admitted that the firearm was his, that he carried it in his motorcycle's saddlebag, and that he was in his vehicle, intending to go home at the time (*id.* at 126).

In closing, Ijah argued that he was directly en route to his motorcycle that was owned by him, and under his control (*id.* at 147-48). He reminded the jury that there was no evidence of him possessing a gun inside Crying Shame, and that the only evidence was that he was on and by his motorcycle, which he argued is authorized under the statue (*id.*).

In addition to arguing that the State had proven every element, importantly in the State's closing, as to the definition of "premises" the State read to the jury as follows from the charge: "premises is defined by the Texas Alcohol and Beverage Code is – means the ground and all buildings, vehicles, and appurtenances pertaining to the grounds. That means that property belonging to that establishment is part of that premises." (*Id.* at 143.) The State's argument in rebuttal was that "if [Ijah] didn't want to break the law and have a gun out on his person at a bar, left it in his saddlebag. He had to unroll it and could have put it back in. But he

didn't, he put it on him," (*id.* at 152). The State further argued that "even if for some reason you decide to believe a story you shouldn't, he's still guilty. Still guilty. Had it on him, wasn't en route to a vehicle," (*id.* at 154). The jury found Ijah guilty.

At punishment, Ijah proved up his motion for community supervision and the jury recommended community supervision (7 RR 6, 46). The trial court followed the jury's recommendation, placing Ijah on community supervision for 4 years (*id.* at 49).

SUMMARY OF THE ARGUMENT

The evidence is legally insufficient to sustain the conviction because there was no evidence that the parking lot where Ijah carried his handgun was a licensed premises; specifically, that the parking lot was a grounds or adjacent premises that was under the direct or indirect control of the Crying Shame and therefore a premises licensed at the time of the alleged offense. There was undisputed testimony that Ijah did not carry inside of Crying Shame, only in the parking lot while inside of or directly en route to his his motorcycle.

To have put on legally sufficient evidence, the State must have proved that the parking lot was a premises within the Alcoholic and Beverage Code Section 11.49(a) definition by which the trial court charged the jury. The parking lot is not a building, vehicle or appurtenance. Therefore, the State was left to prove that it was grounds or an adjacent premises that was directly or indirectly under the control of Crying Shame. It failed to do so. Therefore, the evidence is legally insufficient to sustain the conviction.

ARGUMENT & AUTHORITIES

Ijah was convicted of the third-degree offense of unlawful carrying a weapon under Texas Penal Code § 46.02, which provides that:

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly carries on or about his or her person a handgun ; and

(2) is not:

(A) on the person's own premises or premises under the person's control; or

(B) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

(c) An offense under this section is a felony of the third degree if the offense is committed on any premises licensed or issued a permit by this state for the sale of alcoholic beverages.

In the First Main Charge of the Court, "Premises" was defined using the Section 11.49(a) Alcoholic and Beverage Code definition, "as grounds and all buildings, vehicles, and appurtenances pertaining to the grounds,

including any adjacent premises if they are directly or indirectly under the control of the same person." (CR 46.) The State failed to prove that the parking lot in which it was undisputed the carrying occurred was a premises within the meaning of the definition charged to the jury.

I. The evidence is legally insufficient to sustain the conviction.

In a review of the sufficiency of the evidence to support a conviction, a court views all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When performing an evidentiary sufficiency review, a court may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012).

In *Richardson v. State*, where appellant challenged the sufficiency of the evidence the same Ijah does here. (823 S.W.2d 773, 776 (Tex. App. —Ft. Worth 1992, no pet.)). In concluding the evidence was sufficient, the court specifically reasoned that, "[appellant] could have been found to have been

in possession of an unlawful weapon on licensed premises while in the convenience store or while inside the vehicle which was on the [convenience store] parking lot3," (*id.*). Importantly, the court held that "the parking lot of a licensed premises is part of the 'premises' pursuant to section 11.49(a) of the Alcoholic Beverage Code." (823 S.W.2d 773, 776 (Tex. App. —Ft. Worth 1992, no pet.)). In support, the court cited to *Wishnow v. Texas Alcoholic Beverage Com'n*, 757 S.W.2d 404, 410 (Tex. App.—Ft. Worth 1988, pet. denied).

Wishnow is an appeal from a permit suspension by the Alcoholic Beverage Commission. (*Id.* at 406). Appellant challenged the sufficiency of the evidence of the hearing examiner's findings as to the extent of his knowledge of a violation that included a delivery of cocaine on the sidewalk outside the club, which appellant argued was not "on the premises" under the Section 11.49(a) definition. (*Id.* at 406, 409). The Alcoholic Beverage Code holds a permittee responsible for supervising the

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[3] Testimony of the convenience store clerk that established appellant was carrying a handgun in the convenience store before law enforcement found the gun in his vehicle (*id.*).

premises. (*Id.* at 410). Appellant admitted that his exerted control over his establishment and operation of business extended to the parking lot, which included him and his employees "routinely checking the parking lot for loiterers and other suspicious people and they watch single women to be sure they reach their cars safely." (*Id.* at 410). Appellant further admitted that he employed a doorman whose "primary duty it was to work the front door and monitor the area adjacent thereto." (*Id.*) This doorman was the individual charged with the delivery of cocaine. (*Id.*) Therefore, under the sufficiency standard in permit suspension hearings, the court pointed to appellant's own admissions demonstrating his control over the parking lot as sufficient evidence that the sidewalk was a premises under the Section 11.49(a) definition to support its holding: "Thus, the sidewalk area would be considered part of the premises for the purposes of the administrative hearing." (*Id.*)

Crucially however, the *Wishnow* court did not say whether it was making a finding that the sidewalk was a "grounds" or "adjacent premises if they are directly or indirectly under the control of the same person"

under Section 11.49(a). Four years later in *Richardson*, the Fort Worth court makes this unsupported distinction on its own and uses *Wishnow* as its authority. This of little consequence in *Richardson* because the evidence was sufficient to show that appellant had also carried in the store, not only his vehicle. 823 S.W.2d at 776. For Ijah here though, this distinction is critical. Unlike in *Wishnow* where it was clear that the parking lot was a part of the premises either as a ground or adjacent premises based on specific examples of direct control – appellant and his employees routinely monitoring parking lot activities and the employment of a designated employee to further handle this responsible - that is not so here. There is no dispute that Ijah was only in the parking lot with his handgun, and there is no evidence to support the conclusion that the parking lot is either a grounds or adjacent premises directly or indirectly under the control of Crying Shame.

Romero v. State appears to recognize the distinction crafted in *Richardson* and basis its erroneous holding on it. In *Romero*, appellant made the same challenge Ijah does here, arguing that the State was required to

prove evidence that the parking lot was directly or indirectly under the control of the same person. 2008 WL 2369691 at *3 (Tex. App.—Amarillo, June 11, 2008, no pet.)(not designated for publication). More broadly, but again, the question there was whether the parking lot was a premises within the Section 11.49(a) definition. The Amarillo Court concluded that it was, reasoning that:

> Appellant argues the State was required to produce evidence the parking lot was directly or indirectly under the control of the same person. *That would be true if the State were showing appellant carried the handgun on premises adjacent to the licensed premises*. As we see the evidence, the jury could have concluded the parking lot or area in front of the bar, in which appellant's vehicle was parked, was a part of the bar premises, not adjacent premises. . . Thus, in *Richardson v. State,* 823 S.W.2d 773, 776 (Tex. App. Forth Worth 2002, no pet.), the court found the parking lot of a convenience store to be part of the "premises" pursuant to Section 11.49(a) of the Texas Alcoholic Beverage Code.

(emphasis added)

Ijah would caution this Court from continuing to elaborate on the unsupportable *Richardson* distinction, as it appears the Amarillo Court did[4],

[4] Other courts have even gone on to construe *Richardson* to stand for the proposition that a parking lot of a licensed premises is controlled by the licensee as a matter of law. *George v.* State, 1995 WL 155535 at *1 (Tex. App.—Houston [1st] April 6,

that a parking lot is a part of a permitee's "grounds" without evidence to do so, or based on an interference of close proximity alone. It is all too common that parking lots are privately owned, publicly owned by a municipality, a hybrid of private-public ownership, or service multiple businesses. Holding that any person cannot carry a handgun inside of or directly en route to their motor vehicle that is in a parking lot, as would otherwise be permissible under § 46.02, that is merely near or close to an establishment licensed to sell alcohol must be more broad than originally intended. Perhaps there was a time where this was practically possible, in today's society it is not.

If the State here had put on the same or comparable testimony as was put on in *Terry v. State*, 877 S.W.2d 68 (Tex. App.—Houston [1st] 1994, no pet.), there would not be an issue. In *Terry*, appellant raised insufficiency on the same basis as Ijah does here with a slight variance.[5] The *Terry*

1995, no pet.)(not designated for publication).

[5] His first (of three) issues was regarding the definition of premises used in the jury charge. (*Id.* at 69). Appellant argued that if the "correct" Penal Code § 46.02 definition had been used in the jury charge, the evidence was insufficient. Appellant likewise conceded that if the Section 11.49(a) definition was used that the parking lot would be included and therefore the evidence sufficient.

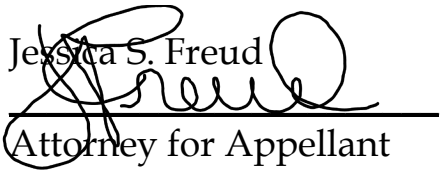
testimony in support of the parking lot as a Section 11.49(a) premises was clear: a copy of the liquor permit was introduced into evidence through an ABC agent, who described the premises as including the Section 11.49(a) language. Further, an employee of the club, who was also present on the night of the incident, testified that the parking lot was used by club customers and maintained by club employees, and that the club in fact owned the dumpster by which appellant was first seen standing with the weapon. (*Id.* at 70). This testimony clearly supports a finding that either a parking lot or dumpster is an adjacent premises that were shown to be directly or indirectly under the control of the club permitee. (*Id.*) Such evidence is absent here.

For these reasons, the evidence is legally insufficient to sustain Ijah's conviction.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Ijah prays this Court reverse and remand for a new trial, or any other relief to which he is justly entitled.

Respectfully submitted,

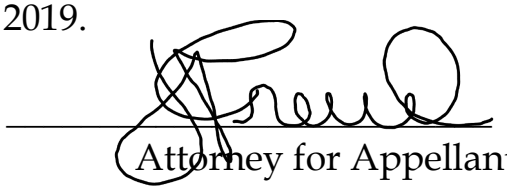


Jessica S. Freud

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Brief was emailed to Sterling.Harmon@co.mclennan.tx.us and/or Gabe.Price@co.mclennan.tx.us of the District Attorney's Office of McLennan County, Texas, on November 13, 2019.



Attorney for Appellant

IN THE COURT OF APPEALS

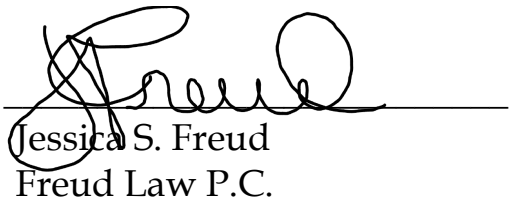
TENTH JUDICIAL DISTRICT OF TEXAS

WACO, TEXAS

Ijah Iwasey Baltimore	*	
	*	
v.	*	
	*	No. 10-19-00196-CR
State of Texas	*	
	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), I hereby certify that the Appellant's Brief contains 3,370 words. The document was prepared using Microsoft Word, and the word count was generated using that program.



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